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No. 10-251

Supreme Court, U.S.
FILED
SEP - 9 2010
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In The Supreme Court of the United States

EXPERIAN INFORMATION SOLUTIONS, INC.,

Petitioner,

v.

MARIA E. PINTOS, and
PACIFIC CREDITORS ASSOCIATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT PACIFIC CREDITORS ASSOCIATION'S BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the *Pintos* court's interpretation of 15 U.S.C. § 1681b(a)(3)(A) of the Fair Credit Reporting Act (FCRA) – which precludes a creditor from obtaining legal access to a consumer's credit report during collection unless the consumer *voluntarily initiates the transaction* creating the debt – should be rejected as inconsistent with the language of the statute, its historical interpretation and public policy.

A corollary issue is whether the *Pintos* court's further interpretation of 15 U.S.C. § 1681b(a)(3)(A) as permitting access to the credit report of a judgment debtor is consistent with the court's reasoning that a voluntarily initiated transaction by the debtor is required to obtain a debtor's credit report.

RULE 14.1(b) LIST OF PARTIES

The Petitioner in this Court is Experian Information Solutions, Inc. (hereinafter "Experian"). Petitioner Experian was a defendant, appellee and cross-appellant below.

The Respondent is Maria E. Pintos, who was the plaintiff, appellant and cross-appellee below.

Pacific Creditors Association (hereinafter "PCA") was a defendant and appellee below but is not formally joined as a Petitioner to Experian's Petition for a Writ of Certiorari.

Pursuant to Supreme Court Rule 12.6, PCA proceeds herein as a Respondent, submitting the following brief in support of Experian's Petition for Writ of Certiorari, and otherwise incorporating Petitioner's Petition for Writ of Certiorari and its accompanying Appendix.

RULE 29.6 STATEMENT

PCA, a California corporation, has no parent company, subsidiary, or affiliate that has issued shares to the public. In conformity with Supreme Court Rule 29.6, PCA submits it has no parent company or publicly held company owning 10% or more of the corporation's stock.

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OPINION BELOW

PCA agrees with and incorporates Petitioner Experian's recitation of the applicable Opinions Below.

JURISDICTION

PCA agrees with and incorporates Petitioner Experian's jurisdictional statement. PCA also adds:

Experian filed its Petition for Writ of Certiorari on August 19, 2010 within 90 days of the Ninth Circuit's May 21, 2010 denial of rehearing and rehearing en banc. As such, it was timely filed pursuant to Supreme Court Rule 13.1. Pursuant to Supreme Court Rule 12.6, PCA's Respondent's Brief supporting Petition for a Writ of Certiorari is hereby filed within 20 days of August 20, 2010, the date the instant matter was placed on the Court's docket. *See* Sup. Ct. R. 12.6.

STATUTORY PROVISIONS INVOLVED

PCA agrees with and incorporates Petitioner Experian's recitation of the Statutory Provisions Involved.

PCA submits that the following additional FCRA subsection is also relevant to this Court's consideration of the issues:

15 U.S.C. § 1681a(m) provides:

> The term "credit or insurance transaction that is not initiated by the consumer" does not include the use of a consumer report by a person with which the consumer has an account or insurance policy, for purposes of –
>
> (1) reviewing the account or insurance policy; or
>
> (2) collecting the account.

STATEMENT

1. The Fair Credit Reporting Act (FCRA) was enacted in 1970 to, among other things, "promote efficiency in the Nation's banking system" and, at the same time, to protect "consumer privacy." *See TRW, Inc. v. Andrews*, 534 U.S. 19, 23 (2001). The FCRA permits access to an individual's credit history often compiled over years reflecting the individual's purchases, payment history and other financial and legal transactions. The FCRA, however, regulates access by third parties to the individual's credit information for certain restricted and enumerated purposes set forth at 15 U.S.C. § 1681b, *et seq*. The challenged "permissible purpose" here was PCA's acquisition of Ms. Maria Pintos' credit report to aid in the collection of a deficiency debt owed by Ms. Pintos. Under the FCRA, pulling a credit report without a permissible purpose subjects the party who obtains the report to civil liability in the form of

actual and statutory damages, attorneys fees and costs. 15 U.S.C. §§ 1681b(f), 1681n and 1681o. As a corollary obligation, consumer reporting agencies, such as Experian here, are required to design and maintain reasonable procedures to prevent access to an individual's credit history unless a permissible purpose exists to pull his or her report. *See* 15 U.S.C. § 1681c(a).

2. As noted in Petitioner's briefing, the specific subsection at issue here is 15 U.S.C. § 1681b(a)(3)(A). This subsection permits the "pulling" of an individual's credit report "in connection with a credit transaction involving the consumer" and where the transaction involves or leads to the "collection of an account of the consumer." In 2004 (and indeed even up to today outside of the Ninth Circuit), § 1681b(a)(3)(A) was construed to permit the pulling of a consumer's credit report to aid in the collection of a debt, regardless of whether the transaction giving rise to the debt could be characterized as "voluntary" or "initiated" by the consumer. *See, e.g., Hasbun v. County of Los Angeles*, 323 F.3d 801 (9th Cir. 2003); *accord Phillips v. Grendahl*, 312 F.3d 357, 366 (8th Cir. 2002) (debt collection is a permissible purpose to pull credit report under 1681b(a)(3)(A)); *Lusk v. TRW*, 173 F.3d 429 (6th Cir. 1999) (same – unpublished); *Duncan v. Handmaker*, 149 F.3d 424, 428 (6th Cir. 1998) (same); *Miller v. Wolpoff & Abramson*, 309 F. Appx. 40 (7th Cir. 2009) (same – unpublished); *Dumas v. City of Chicago*, 234 F.3d 1272 (7th Cir. 2000) (same – unpublished).

3. The Federal Trade Commission, the agency tasked with interpreting and enforcing the FCRA, has historically recognized that pursuant to 15 U.S.C. § 1681b(a)(3)(A), a permissible purpose exists to pull a consumer's credit report "for use in attempting to collect that consumer's debt." 16 C.F.R. pt. 600, App. § 604(3)(A), cmt. 1(A) 2002.

4. The basic facts are these: Ms. Pintos parked her unregistered vehicle illegally on a public street in San Bruno, California. Pet. App. 10a. The police department had her vehicle towed and impounded by P&S Towing. Pet. App. 10a. After being given the opportunity, but failing, to reclaim her vehicle by the payment of the towing and storage charges, P&S Towing commercially sold the vehicle pursuant to California Civil Code §§ 3068.1 and 3068.2. Pet. App. 10a. The sale did not fully pay off the charges, and P&S Towing assigned collection of the deficiency debt, owed by Ms. Pintos, to PCA, a debt collection company. Pet. App. 10a. As part of its collection attempt, PCA pulled Ms. Pintos' credit report from Experian on December 5, 2002. Pet. App. 10a.

5. Ms. Pintos brought suit against PCA and Experian on December 4, 2003, on the basis that collection of this debt did not provide a permissible purpose for pulling her credit report. Ms. Pintos alleged that PCA had violated the FCRA by obtaining the report and Experian had violated the FCRA by supplying it. On November 9, 2004, the District Court for the Northern District of California (per Hamilton, J.) granted summary judgment to both PCA and

Experian, finding that debt collection was a permissible purpose under 15 U.S.C. § 1681b(a)(3)(A), relying on, among other authority, the Ninth Circuit's earlier *Hasbun* decision. Pet. App. 72a-75a.

6. Pintos appealed. In its now withdrawn and superseded first opinion, the Ninth Circuit reversed the summary judgment, holding that a consumer's credit report could only be pulled for collection purposes under § 1681b(a)(3)(A) when the debt was the product of an underlying credit transaction in which the debtor voluntarily sought credit. Pet. App. 59a-60a. Because the Ninth Circuit found that the towing deficiency was "involuntary," it held that no credit transaction had occurred and hence, her credit report could not be validly obtained pursuant to § 1681b(a)(3)(A). Pet. App. 60a.

7. Both PCA and Experian petitioned for rehearing and rehearing en banc. After a change in the panel, with Judge Bea replacing Judge Schiavelli, the panel, on April 30, 2009, issued a new decision, again reversing the District Court, but for a different reason. This time, the majority interpreted the language of the statute which provides: "credit transaction involving the consumer" to require a transaction voluntarily *initiated* by the consumer. Pet. App. 38a-39a. Moreover, in an effort to reconcile its earlier *Hasbun* decision (which applied to the collection of a judgment debt) with this new interpretation of the statute, the majority found that the collection of a judgment debt is always a permissible purpose under § 1681b(a)(3)(A). Pet. App. 40a-41a. Judge Bea wrote

a strong dissent, in essence stating that the majority opinion was wrong in its core holding that there was no permissible purpose to pull Ms. Pintos' credit report. Pet. App. 48a-51a. Judge Bea commented on the jurisprudential disarray created by the majority's attempt to reconcile *Hasbun* with its *Pintos* holding. Pet. App. 51a. Judge Bea wrote that there was no textual or other coherent basis for distinguishing the collection of judgment debts – presumably almost always obtained involuntarily through transactions not initiated by the consumer – from the collection of other debts. Pet. App. 51a. Indeed, in the original *Hasbun* decision, the court tethered its conclusion that a permissible purpose existed to the analysis that judgment debts were simply a subset of a larger universe of debts – some voluntarily created, and some not – the collection of which provide a permissible purpose to pull a credit report under 15 U.S.C. § 1681b(a)(3)(A). *Hasbun*, 323 F.3d at 803.

8. Again, PCA and Experian sought rehearing or rehearing en banc. On May 21, 2010, the Ninth Circuit reissued its second decision, with one footnote added wherein the majority provided it had not been "persuaded . . . to change our opinion." Pet. App. 3a, 17a-18a. Judge Bea's dissent remained unchanged.

9. Chief Judge Kozinski, writing for six other dissenting judges (including Judges O'Scannlain, Kleinfeld, Gould, Tallman, Callahan and Bea), argued en banc review should have been granted. Pet. App. 5a. He noted that when the FCRA was construed as a

whole, with § 1681b(a)(3)(A) read in harmony with § 1681a(m) and § 1681b(c), a creditor should be permitted to pull a credit report in connection with collection. This is true, he argued, whether or not the debt-creating transaction was voluntarily "initiated" by the consumer. Pet. App. 7a. He bluntly stated: "In holding otherwise, the majority flunks Statutory Interpretation 101." Pet. App. 8a.

REASONS FOR GRANTING THE PETITION

I. THIS CASE RAISES AN IMPORTANT QUESTION REGARDING THE INTERPRETATION OF THE FCRA AT 15 U.S.C. § 1681b(a)(3)(A) WHICH SHOULD BE RESOLVED BY THIS COURT.

The initial step in statutory construction is to determine "whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997); *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240 (1989).

A corollary canon of statutory interpretation requires that statutes be read as a whole since the meaning of the statutory language, plain or not, necessarily depends on context. *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991). Statutes should normally be construed under the assumption that Congress intended each of the statute's terms to have

significance and import. *See, e.g., United Savings Assn. of Texas v. Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365, 371 (1988) (while a provision may appear ambiguous "in isolation" this ambiguity is "often clarified" by comparing how the same terminology is utilized elsewhere in the statute).

The majority's construction of § 1681b(a)(3)(A), requires the debt to arise from a credit transaction that is voluntarily initiated by the consumer in order to validly pull a credit report for collection purposes. This interpretation is at odds with the above rules of construction as pointed out by Chief Judge Kozinski. In considering § 1681b(a)(3)(A) in isolation, a divided Ninth Circuit panel succumbed to "the unhealthy process of amending the statute by judicial interpretation." *Public Citizen v. U.S. Department of Justice*, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring).

Given the importance of nationwide uniformity in interpreting federal legislation, particularly laws such as § 1681b(a)(3)(A) that are relied upon thousands (and perhaps tens of thousands) of times a day by creditors, this Court's intervention is needed.

A. The Language Of § 1681b(a)(3)(A), Read In Conjunction With § 1681b(c), Forecloses The Majority's Consumer "Initiation" Requirement.

The Ninth Circuit majority held that under the permissible purpose related to collections (subsection

1681b(a)(3)(A)) a "credit transaction involving the consumer" must be *initiated* by the consumer. Pet. App. 15a-16a. A consumer seeking and obtaining a credit card would appear to be a prototypical example of a transaction initiated by the consumer. Here, because Ms. Pintos was found not to have voluntarily "initiated" the circumstances leading to the towing of her vehicle and the resultant debt, the *Pintos* majority concluded that PCA was not legally permitted to access her credit report – even though it was sought in conjunction with the collection of a debt. Pet. App. 14a-15a.

15 U.S.C. § 1681b(a) states in relevant part:

> (a) In general
>
> Subject to subsection (c) of this section, any consumer reporting agency may furnish a consumer report under the following circumstances and no other:
>
> . . .
>
> (3) To a person which it has reason to believe –
>
> (A) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer. . . .

15 U.S.C. § 1681b(c) provides:

(c) Furnishing reports in connection with credit or insurance transactions that are not initiated by the consumer

(1) In general

A consumer reporting agency may furnish a consumer report relating to any consumer pursuant to subparagraph (A) or (C) of subsection (a)(3) of this section in connection with any credit or insurance transaction that is not initiated by the consumer only if –

(A) the consumer authorizes the agency to provide such report to such person; or

(B)(i) the transaction consists of a firm offer of credit or insurance;

(ii) the consumer reporting agency has complied with subsection (e) of this section; and

(iii) there is no in effect an election by the consumer, made in accordance with subsection (e) of this section, to have the consumer's name and address excluded from lists of names provided by the agency pursuant to this paragraph.

15 U.S.C. § 1681a(m) provides:

The term "credit or insurance transaction that is not initiated by the consumer" does not include the use of a consumer report by a person with which the consumer has an account or insurance policy, for purposes of –

> (1) reviewing the account or insurance policy; or
>
> (2) collecting the account.

Distilled to their relevant essence, 15 U.S.C. §§ 1681b(a), 1681b(c) and 1681a(m) may be diagrammed as follows:

> Any consumer reporting agency may furnish a consumer report:
>
> To a person [that] intends to use that information in connection
>
> [1.] with a credit transaction involving the consumer, and
>
> [2.] involving (a) the extension of credit to, or (b) the review, or (c) collection of an account of the consumer.
>
> If the credit transaction is *not initiated* by the consumer, additional requirements must be met before a credit report may be pulled.
>
> But these limitations on credit transactions "not initiated by the consumer" do not apply when the consumer report is being pulled "by a person with which the consumer has an account for the purpose of collecting [on] the account."

In his dissent to the Ninth Circuit's refusal to hear the matter en banc, Chief Judge Kozinski wrote as follows:

> Putting sections 1681b(a)(3)(A), 1681b(c) and 1681a(m) together, then, it's clear that:

> (1) Consumers can be "involved" in credit transactions under section 1681b(a)(3)(A) that they didn't initiate;
>
> (2) Section 1681b(c) provides certain restrictions on access to reports under section 1681b(a)(3)(A) when the consumer didn't initiate the transaction; and
>
> (3) Those limitations don't apply here because section 1681a(m) says that Pintos initiated the transaction.

Pet. App. 7a (paragraphs and spacing added).

Chief Judge Kozinski carefully articulated where he believed the majority's analysis went wrong:

> The [majority's mistake] is plain. If subparagraph A of a statute said "all fruit shall be inspected before it can be put into a dessert," and subparagraph B said "in the case of tomatoes inspected under subparagraph A, authorities shall perform extra special inspections," we'd know that subparagraph A covers tomatoes. Section 1681b(c) provides special limits on access to credit reports sought under section 1681b(a)(3)(A) when transactions aren't initiated by consumers. We therefore know that section 1681b(a)(3)(A) covers transactions not initiated by consumers. . . .

Pet. App. 7a.

The *Pintos* majority relied on *Andrews v. TRW, Inc.*, 225 F.3d 1063, 1067 (9th Cir. 2000), *rev'd on other grounds, TRW, Inc. v. Andrews*, 534 U.S. 19 (2001), for reading an "initiated by" requirement into § 1681b(a)(3)(A). (Pet. App. 13a-14a.) But *Andrews* never uses the word initiated.[1]

Instead, the *Andrews* court looked to the dictionary for definitions of "involve" and chose the definition "to draw in as a participant." *Andrews,* 225 F.3d at 1067. Relying on this definition, the court concluded that a victim of identity theft could not be deemed "involved" in the transaction. *Id.* at 1067.

Here, PCA respectfully submits the panel majority's leap from "to draw in as a participant" to "initiated by" is unsupportable. If one is *drawn in* as a participant against their will – it necessarily follows that they did not initiate the transaction. Indeed, in his dissent, Judge Bea persuasively distinguishes the instant case from the situation presented in *Andrews.* Pet. App. 26a.

Judge Bea emphasizes that under the circumstances of the facts at bar Ms. Pintos was truly "involved" in the debt-creating transaction and, indeed, may even be viewed as having "initiated" the transaction.

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[1] It appears that the "initiated by" language is taken from the Seventh Circuit opinion *Stergiopoulos, et al. v. First Midwest Bancorp, Inc.*, 427 F.3d 1043, 1047 (7th Cir. 2005).

> Pintos, . . . was no innocent bystander in the chain of events that resulted in her debt to P&S Towing ("P&S"). Pintos chose – for two consecutive years – not to pay the automobile registration fees required by California law. Pintos chose instead to break the law by driving her car on expired tags. *See* Cal. Veh. Code § 4000(a)(1) ("No person shall drive, move, or leave standing upon a highway . . . any motor vehicle . . . unless it is registered and the appropriate fees have been paid. . . ."); *see also id.* § 42001.8 (making it an infraction to violate § 4000).
>
> *Pintos chose to leave her car* on a public street, subjecting it to towing. *See id.* § 22651(o)(1)(A) (permitting law enforcement to tow a car whose registration is six months overdue). And *Pintos chose not to pay* the fees assessed by P&S or retrieve her car in a timely manner, resulting in the lien sale and deficiency claim. *See* Cal. Civil Code §§ 3068.1, 3068.2 (providing that a towing company has a lien dependent upon possession and a deficiency claim for unpaid towing charges).

Pet. App. 26a (emphasis added).

In light of the above, Judge Bea concludes,

> With all respect both to Pintos and the majority, refusing to pay required vehicle registration fees and parking one's car on a public street *is* asking to have one's car towed.

Id.

Judge Bea's dissent illustrates Ms. Pinto's involvement in a requisite transaction – even if she did not initiate it – for purposes of collection, thereby avoiding § 1681b(c) restrictions and, instead, falling under § 1681b(a)(3)(A).

B. Section 1681a(m)'s Exclusion Of Debt Collection From Non-Consumer Initiated Transactions Further Undermines The Majority's Interpretation Of § 1681b(a)(3)(A).

The majority's interpretation of the statute also fails to reconcile § 1681b(a)(3)(A) and § 1681b(c) with § 1681a(m).

Section 1681a(m), subtitled "Credit or Insurance Transaction That Is Not Initiated by the Consumer" defines "credit . . . transaction that is *not initiated* by the consumer." (Emphasis added.) That definition specifically excludes from its coverage "the use of a consumer report by a person with which the consumer has an account . . . for purposes of . . . collecting the account." 15 U.S.C. § 1681a(m).

Chief Judge Kozinski switched his analogy from fruit to sports to illustrate the panel's error:

> [I]f a statute expressly excluded golf from its definition of "fun sports," we couldn't hold that golf is a fun sport. Section 1681a(m) expressly excludes debt collection transactions from its definition of non-consumer initiated transactions. We therefore can't say

> that a debt collection transaction was non-consumer-initiated.

Pet. App. 7a.

In other words, debt collection activity is an exception to, or exempt from, any "consumer initiated" requirement for obtaining a credit report.

C. The Majority's Interpretation Also Seemingly Ignores The Plain Language Of Yet A Third FCRA Subsection – § 1681b(a)(3)(F)(i).

15 U.S.C. § 1681b(a)(3)(F)(i) sets forth a separate "permissible purpose" for pulling a credit report – a "legitimate business need."

Notably, one way a party may legitimately obtain a credit report under this separate subsection is when the party "otherwise has a legitimate business need for the information – (i) in connection with a business transaction that is *initiated by the consumer* . . . " 15 U.S.C. § 1681b(a)(3)(F) (emphasis added).

Section 1681b(a)(3)(F) confirms that when Congress wants to impose an "initiated by" requirement before a person may pull the credit report of another, it knows how to do so. Therefore, the use of the word "involving" in § 1681b(a)(3)(A) must mean something different than "initiated by." *United Savings Assn. of Texas v. Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. at 371 (1988) (while a provision may appear ambiguous "in isolation" this ambiguity is "often

clarified" by comparing how the same terminology is utilized elsewhere in the statute). Of course there is no reason why it must mean anything more than "involving."

II. THIS CASE HAS SIGNIFICANCE BEYOND THE NEED TO CORRECT THE NINTH CIRCUIT'S STATUTORY MISINTERPRETATION.

Unquestionably, access to consumer credit reports has assumed a vital role in our modern economy. The Ninth Circuit opinion, however, will create uncertainty as to what constitutes a "permissible purpose" under the FCRA in the context of creditor, financial institution and debt collection efforts to collect on overdue debt.

A. Intervention By This Court Is Important To Prevent Transactional Uncertainty To Creditors And Debt Collectors Who Rely On Credit Reports During The Collection/Repayment Process.

The Ninth Circuit opinion eliminates (in the states of the Ninth Circuit) the well established practice by creditors who heretofore had understood that debt collection – *without determination or consideration of the nature of the debt* – provided a permissible purpose for accessing credit reports under § 1681b(a)(3)(A) of the FCRA.

Admittedly, this understanding probably arose from a reading of § 1681b(a)(3)(A) that focused on the "collection of an account" language as opposed to the first part of the sentence which states "in connection with a credit transaction involving the consumer." *See, e.g.*, *Hasbun*, 323 F.3d at 803; *Duncan*, 149 F.3d at 427-28. But, the Ninth Circuit analysis here raises more questions than answers concerning the propriety of when one may obtain the credit report of an individual to aid in the collection of debt.

When, for example, under the lower court's interpretation can a consumer be said to "initiate" a debt? Does the collection of bounced checks or other similar instruments provide a permissible purpose? Is bouncing a check a credit transaction? In California, the writing of a check is not considered a credit transaction (unless post-dated) and is instead akin to money.[2] *Abels v. JBC Legal Group, P.C.*, 428 F.Supp.2d 1023, 1026 (N.D. Cal. 2005).

Does the collection of a medical bill provide a permissible purpose? Presumably it would in the normal course of a patient coming to a doctor for services and subsequently being billed for those services. But what if the services are provided to the patient on an emergency basis? Does a consumer "initiate" a credit transaction by becoming so ill or

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[2] The FTC, however, has opined that collection of a bounced check is a permissible purpose under 15 U.S.C. § 1681b(a)(3)(A). 16 C.F.R. pt. 600, App. § 604(3)(A) cmt. 9 (2002).

injured that he must be taken to an emergency room by an ambulance? If, so, at what point in time does "initiation" occur, and how? And how does the Ninth Circuit imposed "initiation" requirement mesh with the actual statutory language indicating that a consumer should merely be "involved" in the transaction giving rise to the debt?

How about the collection of penalties, fines or taxes? Would these debts, that on their face appear involuntary, provide the creditor, or a debt collector acting on its behalf, with a permissible purpose for obtaining a credit report? Under the majority's decision, only if these involuntary debts are reduced to a judgment would an impermissible purpose be transmogrified into a permissible one under § 1681b(a)(3)(A).

In contrast, if each of these hypothetical situations simply is examined to determine whether they each "involve" the debtor, the answer is an unambiguous "yes."

The confusion and uncertainty generated by this decision surely will affect the national economy. Even setting aside creditors' vital interests in using credit reports as part of their collection efforts, the debt collection industry specifically benefits the economy by recovering "billions of dollars in delinquent debt each year that would otherwise go uncollected." PricewaterhouseCoopers, *Value of Third-Party Debt Collection to the U.S. Economy in 2007: Survey and Analysis*, June 12, 2008, found online at http://www.

acainternational.org/files.aspx?p=images/12546/pwc2007-final.pdf.[3]

The benefits of third-party debt collection, generally, are realized through reduced consumer prices and greater consumer purchasing power. *Id.* Indeed, consumers would face higher prices were it not for the debt collection industry's ability to recoup losses. *Id.* at p. iii.

Judge Gould made this point in his dissent from denial of rehearing en banc. As he recognized, unnecessarily restricting the use of credit reports in the collection process makes debt collection more difficult, and more expensive. Pet. App. 8a. Judge Gould correctly and logically inferred that this increased cost will ultimately be passed on to consumers.

Credit reports are a crucial tool used by creditors to, among other things: locate debtors, assess the collectability of an account and in working with debtors to help find a means for repayment. Credit reports not only help in providing address and telephone information of debtors, but provide

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[3] To assist in quantifying the enormous value of third-party debt collection to the U.S. economy, ACA International (American Collectors Association) – a trade organization that represents over 5,500 members worldwide in the credit collection industry) retained PricewaterhouseCoopers LLP to conduct a survey and economic analysis of third-party debt. The survey, entitled *Value of Third-Party Debt Collection to the U.S. Economy in 2007: Survey and Analysis*, performed in 2008, is alluded to herein to illustrate the "real life" impact of the debt collection industry on our national economy.

employment history and information about assets, as well as other debts and obligations.

The majority's opinion here creates confusion and friction in the consumer-credit financial system and will inevitably lead to much higher transactional costs.

B. Intervention By This Court Is Necessary For Uniform Nationwide Interpretation Of The Important Federal Legislation At Issue.

The Ninth Circuit's decision is seemingly at odds with earlier authority within the Ninth Circuit itself and seemingly conflicts with other Circuit Court opinions as well. It is also undermined by the FTC's historical interpretation.

1. The Majority Opinion Conflicts With Another Ninth Circuit Decision – *Hasbun v. County Of Los Angeles*, 323 F.3d 801 (9th Cir. 2003).

In *Hasbun*, 323 F.3d at 801, the Ninth Circuit found that a creditor possessed a permissible purpose to obtain a credit report under § 1681b(a)(3)(A) when attempting to collect court-ordered child support. The Court reached this conclusion by reasoning that "like other creditors, judgment creditors may utilize § 1681b(a)(3)(A) to access consumer reports." *Id.* at 803. *Hasbun* relied on the following relevant FTC commentary:

> A judgment creditor has a permissible purpose to receive a consumer report on the judgment debtor for use in connection with the collection of a judgment debt, because it is in the same position as any creditor attempting to collect a debt from a consumer who is subject of a consumer report.

Id. at 803.

Simply put, the holding in *Hasbun* was that a judgment creditor may obtain a consumer's credit report to collect a judgment because the "collection of an account" equals "collection of a debt," and a judgment creditor logically stands in no different position than any other creditor who is attempting to collect a debt. *Id.* at 803.

In reaching its determination, the Ninth Circuit approved the generally accepted interpretation of § 1681b(a)(3)(A) to allow creditors, as well as debt collectors, to access consumers' credit reports in connection with the collection of a debt.

> . . . [T]he limited case law addressing this issue has uniformly held that creditors have a permissible purpose in receiving a consumer report to assist them in collection of a debt. In other words, collection of a debt is considered to be the "collection of an account."

Hasbun, 323 F.3d at 803, *citing Duncan v. Handmaker,* 149 F.3d at 428; *Edge v. Professional Claims Bureau, Inc.,* 64 F.Supp.2d 115, 118 (E.D.N.Y. 1999);

and *Korotki v. Attorney Serv. Corp., Inc.*, 931 F.Supp. 1269, 1277 (D.Md.1996).

The *Pintos* majority opinion conflicts with and undermines the reasoning of *Hasbun*. It imposes the requirement that in order for the creditor to pull a credit report, the debt must arise out of a voluntary credit transaction *initiated by* the consumer. Pet. App. 15a.

But *Hasbun* involved a judgment for the payment of back child support obligations. There was *no* credit transaction involved. Certainly, it could *not* be said that Hasbun sought out credit, much less "initiated" any credit transaction. Imposition of the judgment was not voluntary. Thus, under the *Pintos* majority's decision, the new "consumer initiation" requirement, meant that the government officials who had obtained Mr. Hasbun's credit report could not have possessed a permissible purpose.

The majority attempted to resolve this conflict in its analysis by distinguishing *Hasbun* on the grounds that *Hasbun* involved a judgment. Pet. App. 17a. Hence, the majority's caveat that the "consumer initiation" requirement applies to the collection of all debts except those that have been reduced to judgment. *Id.* The question is why?

Nowhere in § 1681b(a)(3)(A), or anywhere else in the FCRA, does the plain language of the statute make an exception for debts reduced to judgment. This exception was apparently created by the *Pintos*

panel majority in order to avoid expressly overruling *Hasbun*, but the conclusion finds no textual support.

The *Pintos* majority's rationale is that judicially established debts "involve" the debtor by operation of law. Pet. App. 17a. However, as pointed out by Judge Bea in his dissent, the deficiency balance owed by Ms. Pintos was also created by "operation of law" under California statutes. *See* Pet. App. 27a-29a. If § 1681b(a)(3)(A) allows a judgment creditor to obtain a credit report in order to aid in the collection of a debt established by law, why does it not logically follow that § 1681b(a)(3)(A) allows a statutory creditor to obtain a credit report in order to aid in the collection of a statutorily established debt, such as that owed by Ms. Pintos?

The court in *Hasbun* held that the collection of judgment debt provided a permissible purpose because a judgment debt was a subset of all debts and debt collection was a permissible purpose under § 1681b(a)(3)(A). However, by untethering *Hasbun* from debt collection generally, it loses all ties to the statutory language. Section 1681b(a)(3)(A) makes no reference to the collection of judgments.

2. The Majority Opinion Departs From The Interpretation Of § 1681b(a)(3)(A) By Other Circuits.

As set forth in Experian's Petition, published and unpublished decisions from other United States

Circuit Courts support the long established understanding that debt collection alone provides a permissible purpose for the pulling of the consumer debtor's credit report, whether or not the debt-creating transaction is initiated by the consumer. Pet. 16-17. Failure to reconcile these cases and to establish a nationwide interpretation of the statute will lead, PCA submits, to any number of unwelcome, mischievous consequences.

For example, the *Pintos* rule places a heavy burden on creditors and debt collection agencies that operate nationwide. Although operating under the same federal statute, the creditors and debt collectors will have to abide by different constructions of the exact same rule depending on the jurisdictions in which they are operating. There will be no uniformity.

Creditors and debt collection agencies operating in the Ninth Circuit will be competitively disadvantaged economically as creditors and debt collectors operating in other jurisdictions will be playing by different, less restrictive, and less expensive, rules.

Consumers with claims, or potential claims, under the FCRA may be encouraged to forum shop to file suit in the most advantageous jurisdiction.

And courts inevitably will be required to resolve questions such as which law applies when a creditor located in the Sixth Circuit obtains a credit report from a credit reporting agency located in the Seventh Circuit pertaining to a consumer that lives in the Ninth Circuit.

PCA submits review (and hopefully reversal) is necessary to avoid such unnecessary complications, uncertainty and potentially unwarranted consequences.

3. The Majority Opinion Departs From The FTC's Interpretation Of § 1681b(a)(3)(A).

As set forth in detail in Experian's Petition, the panel's decision also seemingly conflicts with the FTC's interpretation of § 1681b(a)(3)(A). Pet. 17-18. The FTC is the federal agency charged with enforcement of the FCRA. The FTC's interpretation tends to support the longstanding construal that debt collection provides a permissible purpose to obtain a consumer's credit report. *See* 16 C.F.R. pt. 600, App. § 604(3)(A) cmt. 1 and 2 (2002).

While not binding, the FTC's interpretation of the statute is certainly persuasive and should be given substantial weight. Indeed, with respect to another, related federal statute over which the FTC has authority, reliance on FTC advisory opinions and interpretations is important. *See Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S.Ct. 1605, 1621 and 1625 (2010) (concurring opinion by Justice Breyer) (discussing the federal Fair Debt Collection Practices Act 15 U.S.C. § 1692 *et seq.*).

CONCLUSION

For all of the forgoing reasons, Respondent PCA respectfully supports and joins in Experian's request for the issuance of a Writ of Certiorari. PCA submits that Experian's Petition for a Writ of Certiorari should be granted and the Court of Appeals' judgment summarily reversed, or alternatively, the case should be set for full consideration on the merits.

Respectfully submitted,

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